

# THE NEVER-ENDING CHALLENGE OF DRAFTING AND INTERPRETING STATUTES — A MEDITATION ON THE CAREER OF JOHN FINEMORE QC

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*[In this article, the author describes the life of John Finemore QC, who rose to be Chief Parliamentary Counsel of Victoria (1965–84) in a period of unprecedented growth in the statute book. He explains the special qualities required of a legislative drafter, viewed from his encounters with them in institutional law reform. He then identifies several notable federal exemplars of the art. Drafters are, in a sense, the first lawyers who interpret the legislative text that they propound, doing so in the course of their drafting. The article proceeds to describe the shift in interpretation in Australia from an exclusively textual approach towards an increasing emphasis on the context and purpose of the language. Still, the author suggests, the text retains primacy because of the special legitimacy it enjoys in the political theory of electoral democracy. This proposition is illustrated by reference to the decision of the High Court of Australia in Minister for Immigration and Ethnic Affairs v B. Finally, the article examines the terms of s 15AA of the Acts Interpretation Act 1901 (Cth), as amended in 2011. It concludes that the amended section does not ‘swamp’ the operation of other interpretative rules. It clarifies the operation of a statutory provision that itself reinforces the common law trend towards a purposive interpretation of enacted words, so long as those words permit that approach.]*

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CONTENTS

I John Finmore, Legislative Drafter ..... 142  
II Federal Parliamentary Counsel ..... 145  
III Statutory Interpretation: The Big Shift ..... 150  
IV A 2011 Amendment ..... 168  
V Fashion and Change in Statutory Interpretation ..... 172



*John Finmore in 1993*

## I JOHN FINEMORE, LEGISLATIVE DRAFTER

John Charles Finemore was one of those *rarae aves* whom most lawyers take for granted. His impact upon law, especially the law expressed in the statute books of Victoria, was considerable. My object is to pay a tribute to him and to others of his calling. As well, it is to explain the ways in which a gifted drafter of legislation contributes to the rule of law; to the task of judges and lawyers who translate text into action; and to the challenge of interpretation, when uncertainties as to meaning arise. In a sense, the drafter of legislation, as of other forms of the written law, is the first interpreter of the text.<sup>1</sup> It is the drafter who first looks at the text, ponders upon its meanings and hypothesises about the potential ambiguities that must, as far as possible, be eliminated if the will of the lawmaker is to be given effect.

John Finemore became the head of the Office of the Chief Parliamentary Counsel in Victoria. That position was first created in 1879, in colonial times. Earlier, it had been normal to engage members of the private Bar to draft statutes. However, as Victoria became more prosperous and the statutes more numerous and substantial, a full-time draftsman was recruited. From the first, the office-holder was a distinguished and respected lawyer, with interests in, and talents for, legal drafting.

Drafting public laws is a special vocation within the profession of the law. It requires particular mental capacities. They include viewing the subject matter of the proposed legislation as a conceptual whole; expressing the proposed rules conformably with the constitution and the instructions of the government or other proponent; grafting the intended new law onto an already large and complex body of statute law; attending to inconsistent statutory provisions needing to be repealed or modified; and doing all this with clarity and brevity, and generally with great speed, essential to accommodate the urgencies of the parliamentary timetable. John Finemore manifested all of these capacities in rare combination.

He was born on 19 March 1924 in Melbourne. He attended St Patrick's College in East Melbourne and the University of Melbourne where, in 1940, he began his studies towards the bachelor's degree in law. Also in 1940, at the age of 17, he joined the Crown Law Department in Melbourne, in whose service he was to remain for 44 years.

<sup>1</sup> This insight was expressed by Mr Jeffrey Barnes in his introduction to the Finemore Lecture 2011. Mr Barnes was legal associate to the author in the Australian Law Reform Commission in 1980.

In 1942, with Australia at war, John Finemore volunteered for military service in the Australian Special Wireless Group, with whom he served as a signalman. He was demobilised in 1946 and returned to Crown Law and to the University to complete his part-time LLB studies. By 1955, he had risen to the rank of Second Assistant Parliamentary Draftsman under the head of the office, Andrew Garran, son of the great Commonwealth lawyer Sir Robert Garran who had served as the first Secretary of the federal Attorney-General's Department. Thus began John Finemore's daily acquaintance with the constitutions of the Commonwealth and of the State of Victoria, of the provisions of both of which Victorian drafters had to be cognisant, so as to avoid the ever-present danger of constitutional invalidity.<sup>2</sup> This was a challenge that Finemore accepted with enthusiasm and met with much success.

In 1965, he was elevated to be First Assistant Parliamentary Draftsman of Victoria. Upon the unexpected death of the head of the office later that year, he was appointed by the Bolte government to be Chief Parliamentary Counsel of Victoria. The honours appropriate to that office duly followed. Several of his predecessors, in earlier times, had been knighted. Virtually all of them had been appointed King's Counsel or Queen's Counsel, as applicable. So was Finemore in 1970. In 1974, he received a civic distinction, common for senior public servants in those days, by his appointment as an Officer of the Order of the British Empire (OBE). It was at this point that our lives intersected.

In 1975, following my appointment as the inaugural chairman of the Australian Law Reform Commission ('ALRC'), I met John Finemore for the first time. It happened in the earliest days of the ALRC and on one of my regular visits to Melbourne. Although he was always professional and impeccably courteous, Finemore never disguised his deep suspicions about a professional law reformer; his particular anxiety about a federal office-holder with that function; and his especial cautions about such an office-holder appointed by the Whitlam government. Those were difficult days for federal-state relations in Australia. Understandably perhaps, with an energetic and inventive federal government, the states, and their officials, were suspicious about of the ever-expanding tide of federal legislation, intruding into areas that, up to that time, had been regarded in the Australian federation as sacrosanct territory of the 'sovereign states'. Years later on the High Court of Australia, in *New South Wales v Commonwealth* ('*Work Choices Case*'), I remembered John Finemore as I wrote my dissenting opinion, with its defence of the federal idea that lies

<sup>2</sup> *Constitution* s 109.

at the heart of our *Constitution*.<sup>3</sup> In fundamentals, John Finemore and I probably had more values in common than either of us suspected at the time.

In 1980, Finemore joined the Faculty of Law in the University of Melbourne and he served on that body until 1987. In 1984, he stood down from his post as chief legislative drafter, commencing service in the following year as Chief Executive Officer of the Council of the Australian Constitutional Convention. This was a body set up to review the *Constitution* and to propose and facilitate any amendments deemed necessary and desirable. Remarkably enough, notwithstanding the labours of that body, no formal constitutional change has occurred in Australia since the amendments last adopted in May 1977, which provided for the appointment of Senators of the same party as those elected who die in office or resign;<sup>4</sup> allowed territory residents to vote in federal elections and referendums;<sup>5</sup> provided for the compulsory retirement of High Court judges; and for the end of the life tenure of federal judges.<sup>6</sup> I supported, and voted for, all of these changes, including the last, which I supported on the ground that it secured generational change in the composition of the federal judiciary — the third branch of the national government.

Following his retirement as Chief Parliamentary Counsel, Finemore continued his public activities as a member of the Victorian Law Foundation and as a director of several companies, including Union Fidelity Trustee Co of Australia Ltd. In 1985, his public service was further recognised by his being appointed an Officer of the Order of Australia. The following year his wife, Margaret Finemore, died. With her, he had three sons and five daughters. He himself died in 1996 at the age of 72 years — a very young age, being my own at the time of this lecture. He was a lifelong pipe smoker and became known to his grandchildren as ‘Tobacco’.

In 1998, the Victorian Department of Justice created an award in honour of John Finemore that was continued under successive Attorneys-General of differing political stripes. This memorial lecture was inaugurated in 2010. The first was delivered by Sir Daryl Dawson, who was serving on the High Court of Australia at the time of my appointment in 1996. Sir Daryl spoke on a subject and with a viewpoint that would have delighted Finemore: ‘The Increasing Extent of Commonwealth Power’. This was a phenomenon that Justice Dawson, like Finemore, regarded with steadfast resistance.

<sup>3</sup> (2006) 229 CLR 1, 182–246 [423]–[616].

<sup>4</sup> *Constitution* s 15. See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5<sup>th</sup> ed, 2010) 1403.

<sup>5</sup> *Constitution* s 128.

<sup>6</sup> *Ibid* s 72.

Fortunate was Victoria to have in its service John Finemore as its Chief Parliamentary Counsel. The work of parliamentary counsel has been likened to that of an artist, holding up the mirror to reality and producing at best an imperfect reflection in the text of the intended law. Finemore's drafts were as good as they get in Australia. Ahead of his time, he was always a strong supporter of the recruitment of women and of their advancement in the service. Finemore's immediate successor in office in 1984 was Rowena Armstrong QC, the first woman to be employed as Parliamentary Counsel in Victoria and the first woman to be elevated to be Chief Parliamentary Counsel. His current successor as Chief Parliamentary Counsel of Victoria is Ms Gemma Varley, who joined the office in 1978 under Finemore and was appointed Chief in 2008.

As I know from recent work in which I was engaged for the Commonwealth of Nations,<sup>7</sup> recruiting, training, retaining and advancing legislative drafters is a worldwide challenge, particularly in the countries of the Commonwealth, which tend to express their statutes in more detailed terms than those of countries of the civil law tradition. It is a most demanding occupation, requiring a special talent, a particular way of thinking about the law, a broad knowledge of legal rules and a lifelong devotion to intricate legal details. Not everyone enjoys, or is skilled in, this vocation. But John Finemore AO, OBE, QC was.

## II FEDERAL PARLIAMENTARY COUNSEL

Coming as I did from the dark side of the federal service, my chief acquaintance with parliamentary counsel was with those who served in, or under, the Office of Parliamentary Counsel of the Commonwealth. On the establishment of the ALRC in 1975, we regarded it as essential to attach to the Commission's reports draft legislation designed to give effect to the proposals of the Commission. This had earlier been the course followed by the two law commissions created in the United Kingdom on the initiative of Lord Chancellor Gardiner. Not only did the accompaniment of draft legislation facilitate the implementation of reform proposals, it also helped the Commission to focus on the exact reforms that it was suggesting, by expressing them in statutory language and by considering precisely the impact of that text on other statutes

<sup>7</sup> As a member of the Eminent Persons Group on the future of the Commonwealth of Nations (2010–11). See Eminent Persons Group, 'A Commonwealth of the People: Time for Urgent Action' (Report, Commonwealth of Nations, October 2011).

that would need to be repealed or modified if the proposed reforms were to be adopted.

In the first annual report of the ALRC, written by me in 1975, we said:

All overseas and Australian experience teaches that the effectiveness of a law commission increases enormously when it has the assistance of competent drafting staff.

Bramwell CJ once said that ‘people who draw Acts of Parliament are very commonly found fault with by those who never drew an Act themselves’. The skill is a very special one, not made easier in a federal context by the constant problem of grounding legislation in constitutional power. The Law Commission [of England and Wales] from 1967 had four draftsmen on its staff. It now has five. The Lord Chancellor, Lord Elwyn-Jones, has stressed the fact that this facility has eased the parliamentary implementation of the Law Commission’s proposals. The relationship can even be of advantage for the simplification of parliamentary drafting style. The Commission does not underestimate the importance of its role to simplify the law but can do little about it until it has its own drafting facility manned by experts who are well tuned in the technical rules which a federal system especially imposes upon statutory draftsmanship. Clearly, it is essential that the [Australian Law Reform] Commission should draft its own legislation.<sup>8</sup>

The ALRC’s commitment to recruiting legislative drafters was commendable. However, we faced much competition and difficulty. Eventually, the Commission recruited an experienced drafter, Mr Noel Sexton, who helped on a number of early projects, notably the report on *Alcohol, Drugs and Driving*.<sup>9</sup> Later, the Commission recruited a young lawyer with drafting experience, Mr Stephen Mason. Still, by and large, the ALRC had to depend upon improvisations, including the recruitment of present and past officers from the Office of Parliamentary Counsel to act as consultants and, on the side as it were, to assist in drafting the proposed legislation annexed to the reports of the Commission.

One of the first to provide assistance in this way was former First Parliamentary Counsel of the Commonwealth, Mr John Q Ewens. Coincidentally, he had been originally recruited to the federal service from Adelaide, joining the federal Attorney-General’s Department in 1933 selected from 70 candi-

<sup>8</sup> Law Reform Commission, *Annual Report 1975*, Report No 3 (1975) 34 [69] (citations omitted). Cf L C B Gower, ‘Reflections on Law Reform’ (1973) 23 *University of Toronto Law Journal* 257, 260–1.

<sup>9</sup> Law Reform Commission, *Alcohol Drugs and Driving*, Report No 4 (1976) xii.

dates, filling a vacancy in the establishment created by the retirement of Sir Robert Garran.

John Ewens was a most experienced drafter of federal legislation. It was Ewens who drafted many of the important Acts of the Federal Parliament during and after the Second World War, when the need for federal constitutional power was urgent and challenges were frequent. Ewens drafted for the Chifley government the *Banking Act 1947* (Cth), which was struck down by the High Court of Australia (affirmed by the Privy Council) in *Bank of New South Wales v Commonwealth* ('*Bank Nationalisation Case*').<sup>10</sup> Likewise, for the Menzies government, he drafted the *Communist Party Dissolution Act 1950* (Cth). That statute was also struck down by the High Court in *Australian Communist Party v Commonwealth*.<sup>11</sup> But most of his drafts survived the court challenges. In quiet moments in the ALRC, John Ewens would regale his colleagues with stories of the midnight drafting instructions in wartime and during postwar reconstruction, the urgent need to reframe federal laws under ferocious pressures of deadlines set by the needs of war, the government's ambitions and the rigidities of the parliamentary sitting schedules in Canberra.

I later described my first encounter with John Ewens in terms of great admiration:

He was appointed a part-time Commissioner [of the ALRC]. But in the nature of things his redoubtable talent as a drafter was soon to shine forth. The early drafts of legislation for the Commission had been prepared by Mr Jim Munro (of Parliamentary Counsel's office) and Mr Noel Sexton (Director of the Legislative Drafting Institute). Mr Munro's struggles with Mr Gareth Evans (as the Minister then was) were notable for the heat and light which they generated. Noel Sexton was a kindly and most obliging man. He was happy to work with the Commission when the Fraser Government withdrew its support from the Legislative Drafting Institute. With John Ewens's arrival on the scene, the drafts of Noel Sexton — so perfect to our eyes — were subjected to the impatient scrutiny of his former master. Ewens was swift and peremptory in his corrections. I observed how his razor-sharp mind earned the deference of Sexton and the admiration of the distinguished Commissioners who sat at the table with

<sup>10</sup> (1948) 76 CLR 1, aff'd (1949) 79 CLR 497.

<sup>11</sup> (1951) 83 CLR 1.

him. The skills of a trained legislative drafter at work were a wonderful thing to behold.<sup>12</sup>

In the early days of computer technology, the ALRC acquired some of the earliest word processors invented by Dr Wang. Until that time, it was generally necessary, where changes were made to Bills, to shred the previous version and to start typing afresh the entire text. I will never forget the look of astonishment and distress that came over John Ewens's face when he first saw the magic of a word processor. Suddenly all those retypes leapt into his mind with the sight of the new technology that, in a simple electronic stroke, made retyping redundant.

John Ewens was a formidable mathematician. He was also one of the most distinguished servants of the Commonwealth. It was a great privilege for colleagues in the ALRC to work with him. He resented, but hardly ever spoke of, the fact that Chief Parliamentary Counsel in Victoria and in the other states and territories were conventionally appointed, by commission provided by the state Attorney-General, as one of Her Majesty's Counsel learned in the law. This commission was not offered to the federal counterpart, allegedly because of small-minded resistance on the part of the practising Bar. When that notable Victorian lawyer-politician, Gareth Evans QC, was appointed federal Attorney-General in 1983, he asked for an indication of what he could do to support the ALRC. I asked first, that he introduce the Insurance Contracts Bill 1984 (Cth), which he did;<sup>13</sup> and secondly, that he procure the appointment of John Ewens as Queen's Counsel, which he also did.

John Finemore contributed a chapter to a book in honour of John Ewens.<sup>14</sup> In it, he paid tribute to several federal statutes drafted by Ewens. He singled out the brief and effective language of the *Commonwealth Places (Application*

<sup>12</sup> Justice Michael Kirby, 'Statutory Interpretation and the Rule of Law — Whose Rule, What Law?' in David St L Kelly (ed), *Essays on Legislative Drafting in Honour of J Q Ewens*, CMG, CBE, QC (Adelaide Law Review Association, 1988) 84, 85. See also Carmel Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2011) 313–14.

<sup>13</sup> It was enacted and became the *Insurance Contracts Act 1984* (Cth). It was based on Law Reform Commission, *Insurance Contracts*, Report No 20 (1982). The legislation attached to that report was drafted by Stephen Mason, with the participation of John Ewens: at xvi. Stephen Mason's draft provisions were substantially included in the Bill that was eventually enacted.

<sup>14</sup> John Finemore, 'Development of the Commonwealth Statute Book 1901–1986' in David St L Kelly (ed), *Essays on Legislative Drafting in Honour of J Q Ewens*, CMG, CBE, QC (Adelaide Law Review Association, 1988) 28.

*of Laws*) Act 1970 (Cth).<sup>15</sup> He did not refrain from taking a parting shot at the ‘massive and forbidding collection’ that was ‘Commonwealth legislation today’.<sup>16</sup> With just a hint of a competitor’s sense of rivalry, he declared that the terror of the collection of federal law was occasioned by the need for it always to comply with constitutional requirements;<sup>17</sup> and also because of developments in commerce and technology and in the range of human activity that the Federal Parliament ‘is determined to regulate’.<sup>18</sup>

Other fine federal lawyers with whom I worked in those days were, or had been, parliamentary counsel. They included Lindsay Curtis AM (who worked in the Office and on drafting legislation in Papua New Guinea, then an Australian territory); Charles Comans CBE, QC, who was Finemore’s equivalent in the federal office during the combative 1970s; Ewart Smith OBE, who rose to be Deputy Secretary of the federal Attorney-General’s Department in 1971 but who came from what was then called the Commonwealth Parliamentary Drafting Division and drafting service in Papua New Guinea. There were many others including Geoffrey Kolts OBE, QC and Hilary Penfold QC. The last-mentioned rose to be First Parliamentary Counsel of the Commonwealth from 1993 to 2005. She was later appointed a Judge of the Supreme Court of the Australian Capital Territory — a federal instance of the ascent of outstanding women lawyers to the highest responsibilities in the important and interesting work of legislative drafting. She has written insightfully about the interface of legislative drafting and interpretation.<sup>19</sup>

All of these legislative drafters would have known and respected John Finemore as a worthy colleague and intellectual competitor. It was a privilege for me, who came from the outside, to get to know all these brilliant, devoted, quirky officers of high talent and excellence in conceptual thinking about the law.

When, in later years in appeal courts, I would sometimes hear a judicial colleague attack a provision in legislation then under judicial scrutiny and assail the drafter who had produced it, I always sprang to their defence, remembering Lord Bramwell’s dictum. Most judges and lawyers, in their drafts and legal opinions, can get by with discursive approximations. The

<sup>15</sup> Ibid 34.

<sup>16</sup> Ibid 37.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> See Hilary Penfold, ‘Legislative Drafting and Statutory Interpretation’ (2006) 7 *The Judicial Review* 471. This was originally presented at the Annual Conference of the Supreme Court of New South Wales in August 2005.

legislative drafter must satisfy a much more taxing and precise standard. Although perfection can rarely be attained, he or she must look down the years and try to see the infinite variety of factual circumstances that may attract the operation of the legislative provisions. Inevitably, some of the variable circumstances will escape notice or not be thought of as the draft is being produced. Never once, in my judicial years, did I blame the legislative drafters. If ever I was tempted to do so, the ghosts of John Finemore, John Ewens and their colleagues would batter on the windows of my mind. Only a lawyer who has attempted to draft a public law is truly entitled to criticise the drafting of another.

### III STATUTORY INTERPRETATION: THE BIG SHIFT

A highly accomplished legislative drafter will necessarily perform the drafting function keeping in mind the approach that the courts are likely to adopt to elucidate the meaning of the words used. Any other approach would be potentially self-defeating. However, the difficulty for a drafter is that the rules of statutory interpretation have a tendency to change over time, exhibiting a degree of oscillation between adopting a strict and narrow approach to the language and a looser and more flexible approach, according to the tendencies then in vogue.

The strict approach, mandating a so-called 'plain meaning' and 'grammatical' interpretation of statutory language, was the one that prevailed in my early days in the legal profession and during most of the years that Finemore was performing his work as a legislative drafter. This demanded simply that the judge should give a literal interpretation to the words of Parliament, it being presumed that the lawmakers said what they meant and meant what they said.

This approach presented a self-contained universe for interpretation. I have always considered that it had its root in the hostility that many common lawyers (including judges) felt for legislation itself, as a form of law made generally at the behest of non-lawyer politicians. Part of this hostility may have found its origin in the candid recognition by the judiciary that the legislature, right up to the 20<sup>th</sup> century, was not truly representative of the entire population, so that its impositions upon the freedoms and basic rights, as expressed by the judge-made common law, should be restricted to that which was expressly and plainly stated. Whatever the historical reason (and the judges were at the time themselves no more, and probably much less, representative of the entire population than the legislators), a habit of interpretation arose that often resulted in the frustration of the legislative

objectives. Interpretations were adopted that, although generally conformable to the dictionary or literal meanings of the words used, were fairly obviously not what the enacting legislature had intended, and certainly not what the ministerial proposer of the measure had stated to be its object.

This approach to statutory interpretation was quite comfortable for the common law judiciary because it was linguistic, narrow, pernickety and ostensibly unconcerned with outcomes or with grand theories or large objectives. It had the merit of apparently keeping the judges out of consideration of the contestable questions of policy and politics. However, as the Parliaments in English-speaking countries became more and more representative of ordinary citizens and assertive of their needs and rights to make and re-express the law, the frustration of the operation of popular legislation by judges meant that the 'plain meaning' approach gradually became less attractive both to legislatures and to the judiciary itself. Moreover, the approach was tested after the large expansion in the size and role of the public service, the growth of social security and the rise of consumer, environmental and human rights protections that emerged in the half-century that followed the Second World War.

There was one particular feature of the 'plain meaning' approach that began to cause consternation in the legal profession and the judiciary. Legislators and the officials advising them, including legislative drafters, sought to overcome the frustrating outcomes of narrow judicial interpretations of statutory texts by proposing drafts that were increasingly detailed. In this way they sought to cover each and every possibility so that the judges would not have an excuse of frustrating the lawmaker's objectives because of a supposed lack of clarity, certainty and specificity. The consequence was a style of drafting that became oppressive by its sheer weight and detail. As one drafter put it:

[The literal approach was] largely responsible for the style of drafting that has been used in much of our statute book and which is now so heavily criticised by so many people. It was said to have invited 'cumbersome, detailed and sometimes unintelligible legislation in the attempts by Parliament to spell out its purpose in such detail as to prevent the frustration of the legislative purpose by the courts'.<sup>20</sup>

<sup>20</sup> Eamonn Moran, 'The Relevance of Statutory Interpretation to Drafting' (Paper presented at Drafting for the 21<sup>st</sup> Century, Bond University, Gold Coast, 6 February 1991) 105 (citation omitted), quoted in Jeffrey Barnes, 'Statutory Interpretation' in Ian Freckelton and Hugh

Occasionally, even judges suspected that too many of their brethren were evincing too much satisfaction in discovering an interpretation that, once again, resulted in crocodile tears because the apparent objective of Parliament had failed to hit its mark by reason of a suggested defect of drafting. This was an attitude that leading judges began to criticise. They saw it as inimical to the proper constitutional relationship between the courts and the legislature.<sup>21</sup>

It was this gradual shift in the judicial approach that resulted in an increasing emphasis on the so-called ‘purposive’ construction of legislation. This was endorsed with increasing vigour by leading common law judges. An influential opinion, in this regard, was that of McHugh JA in the New South Wales Court of Appeal in *Kingston v Ke prose Pty Ltd* (*‘Kingston’*).<sup>22</sup> It reflected and influenced a change in the judicial approach in Australia. It was one that was quite quickly endorsed by the High Court of Australia in *Bropho v Western Australia*.<sup>23</sup> Although in my judicial reasons, I repeatedly acknowledged the impact of McHugh JA’s reasoning on Australian approaches to judicial interpretation after 1987,<sup>24</sup> the researches of Jeffrey Barnes have revealed that, three years before *Kingston*, in 1983, I had been urging a ‘purposive interpretation’ to facilitate a simpler, less detailed mode of legislative drafting and to reduce the frustration of the clear policy aims by the judges.<sup>25</sup> So by the mid-1980s, the moves were underway in common law courts to take new and fresh approaches to the task of statutory interpretation.

A particular consideration that affected my approach by 1983 was my then recent involvement for a decade in institutional law reform. Repeatedly, I had expressed the view that if only judges could be allowed to supplement their understanding of the objectives of the statute by having access to any applicable law reform and similar documentation, ministerial speeches and memoranda, the risks of the legislation misfiring and the misfortune of overly

Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 721, 724.

<sup>21</sup> *Jones v Wrotham Park Estates Ltd* [1980] AC 74, 105 (Lord Diplock), quoted in *Kingston v Ke prose Pty Ltd* (1987) 11 NSWLR 404, 423 (McHugh JA).

<sup>22</sup> (1987) 11 NSWLR 404.

<sup>23</sup> (1990) 171 CLR 1, 20 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See Barnes, above n 20, 731.

<sup>24</sup> See, eg, *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516, 558 [129] n 135.

<sup>25</sup> Barnes, above n 20, 724–5, citing Justice Michael Kirby, ‘Explanatory Memorandum’ in Attorney-General’s Department, *Symposium on Statutory Interpretation* (Australian Government Publishing Service, 1983) 53, 53–4. See also Kirby, above n 12.

cumbersome texts might be reduced. As a matter of legal history, the push in Australia for a purposive approach coincided with both judicial and statutory encouragements. However, it also coincided with similar encouragement to make use of extrinsic materials to throw light on the meaning of legislation, including by access to law reform and similar reports, as well as to second reading speeches and explanatory memoranda, to supplement the statutory words.<sup>26</sup>

Even so fine a drafter as John Finemore was not vouchsafed the ‘gift of prophecy’. Foreseeing all the possibilities into which the carefully chosen language will be pressed is simply impossible. Especially so because of the multiplicity of tasks and the urgencies under which the laws are commonly drafted, together with the political compromises that actually encourage a certain vagueness that later comes home to roost when new instances arise for their suggested application.

This point can be most easily illustrated by reference to the *Constitution* itself. After all, formally it began its life as an Act of the Imperial Parliament. Only in more recent times has it been recognised that the preceding referendums over the terms for amalgamating the Australian colonies breathed the spirit of popular sovereignty into the instrument. Today the *Constitution* is acknowledged as deriving from the implied will of the Australian people, not just the command of an Imperial power, exercising its then legal sway, imposed on colonial peoples as a manifestation of the wishes of the powerful actors at Westminster.<sup>27</sup> Ignorant commentators — and not a few of them are found in the Australian media — repeat their denunciations of ‘judicial activism’ and demand that judges simply give the words of the *Constitution* (or of a statute) the meaning expressed in the plain language of the text.<sup>28</sup> However, a moment’s reflection shows that things are not always so simple.

Take, as a specific example, s 80 of the *Constitution*. It is one of the comparatively few human rights-type provisions appearing in the document. Therefore, one would expect that it would be given a suitably ample interpretation so as to avoid defeating the evident purpose of including it in the text.

<sup>26</sup> See, eg, *Acts Interpretation Act 1901* (Cth) ss 15AA, 15AB. See also below Part IV.

<sup>27</sup> *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 441–2 (Deane J); *Leath v Commonwealth* (1992) 174 CLR 455, 485–6 (Deane and Toohey JJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

<sup>28</sup> See, eg, Janet Albrechtsen, ‘Judicial Hubris Makes Messy Meal of Our Rights’, *The Australian* (Sydney), 20 June 2007, 12; Janet Albrechtsen, ‘May the Best Person Preside’, *The Australian* (Sydney), 15 August 2007, 14. Cf Barnes, above n 20, 723.

The section says:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial should be held at such place or places as the Parliament prescribes.

There are a number of problems in this text, as later cases have demonstrated. What, for example, is the meaning of a 'trial on indictment'? Does this mean that the guarantee of jury trial in the *Constitution* is limited to those cases by which, in legislation, practice or otherwise, a formal proceeding of indictment (as distinct from proceedings on a summons or other initiating procedure) is provided by law? Obviously, if this view were to prevail, s 80 might just as well have been omitted from the *Constitution* because the Parliament would thereby be empowered, by procedural legislation governing criminal process, to abolish indictments altogether (or to confine their application most narrowly) so that the language of s 80 would have little or no effective application. Remarkably, this is the interpretation that, over the years, a majority of the High Court of Australia has preferred. Even that great judge Isaacs J said in *R v Bernasconi*, '[i]f a given offence is not made triable on indictment at all, then sec 80 does not apply.'<sup>29</sup> Now, Isaacs J was a serial offender in giving the *Constitution* a highly literal interpretation. His magnum opus in this respect was his reasoning in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers' Case*').<sup>30</sup> So far as the heads of federal legislative power are concerned, that decision has put the stamp of literalism on the *Constitution*, extending in at least one matter even to a case where there is an express grant of the relevant power stated to be subject to a condition.<sup>31</sup>

Nevertheless, on the meaning of s 80 of the *Constitution*, there has always been a contrary stream of authority that takes into account the obvious purpose of the section in providing as s 80 does. In a famous dissent, written jointly by Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*,<sup>32</sup> the judges were critical of the prevailing approach to s 80. They argued for a wider, essentially purposive, interpretation of the provision.

<sup>29</sup> (1915) 19 CLR 629, 637. See also *R v Archdall; Ex parte Carrigan* (1928) 41 CLR 128, 139–40 (Higgins J).

<sup>30</sup> (1920) 28 CLR 129, 141–4 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>31</sup> See *Work Choices Case* (2006) 229 CLR 1, 210–13 [499]–[507] (Kirby J).

<sup>32</sup> (1938) 59 CLR 556.

They said:

It is a queer intention to ascribe to a constitution; for it supposes that the concern of the framers of the provision was not to ensure that no one should be held guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury, but to prevent a procedural solecism, namely, the use of an indictment in cases where the legislature might think fit to authorize the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition that 'the *Constitution* is not to be mocked'. A cynic might, perhaps, suggest the possibility that sec 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion, and, if this explanation is rejected and an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorizing the substitution of some other form of charge for an indictment seems but to mock at the provision.<sup>33</sup>

These words have haunted the High Court down the years. In *Kingswell v The Queen*, a majority adhered to the literal approach adopted by Isaacs J.<sup>34</sup> But always there has been the contrary view, on that occasion expressed by Deane J.<sup>35</sup>

The same debate was evident during my own service on the High Court in *Cheng v The Queen* ('*Cheng*').<sup>36</sup> A majority, surprisingly perhaps led by McHugh J, adhered to the narrow or literal interpretation of s 80.<sup>37</sup> However, both Gaudron J<sup>38</sup> and I<sup>39</sup> contested this 'sterile opinion'.<sup>40</sup> I had done so earlier in another case.<sup>41</sup> I regarded the majority line of reasoning as an illustration of the kind of 'earlier formalism',<sup>42</sup> given force in a constitutional context but still then current wherever the task of statutory interpretation was

<sup>33</sup> Ibid 581–2.

<sup>34</sup> (1985) 159 CLR 264, 276–7 (Gibbs CJ, Wilson and Dawson JJ).

<sup>35</sup> Ibid 298 (Deane J).

<sup>36</sup> (2000) 203 CLR 248.

<sup>37</sup> Ibid 292–9 [130]–[152] (McHugh J). I say 'surprisingly' because of McHugh JA's powerful espousal of a purposive construction of ordinary state legislation in *Kingston* (1987) 11 NSWLR 404, 423–4.

<sup>38</sup> *Cheng* (2000) 203 CLR 248, 289 [85]–[86].

<sup>39</sup> Ibid 306–8 [174]–[177].

<sup>40</sup> Ibid 307 [177].

<sup>41</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 422 [95].

<sup>42</sup> *Cheng* (2000) 203 CLR 248, 307 [176].

engaged in Australia. That earlier formalism was natural enough at the time, including for constitutional interpretation, given the English doctrine. But it is less natural now.<sup>43</sup>

The debate over the meaning and effect of the word ‘indictment’ in s 80 will not go away. It may recur in the more recent attempt of the Federal Parliament to provide for non-jury trials before the newly reconstructed military court, freshly minted as a ch III court under the *Constitution*.<sup>44</sup> Cases of that kind oblige the High Court of Australia to resolve anew its basic approach to constitutional interpretation. Is it *literalistic* in the general manner of the approach to interpretation following the *Engineers’ Case*? Or is it *purposive* in the general manner of interpretation nearly a century later? And is there even more reason in interpreting the comparatively rigid and unchanging constitutional text, to search for, and give effect to, a purposive approach, rather than a purely narrow, literal and grammatical approach that prevailed in earlier times?

If this quandary is put to one side, many other questions remain about the meaning of s 80 of the *Constitution*. Most of them derive from the debates that have arisen about the meaning of the little word ‘jury’. Assuming that a jury trial is required for a federal offence, how must that trial be conducted? In *Ng v The Queen*, I summarised the holdings on the essential and inessential features of jury trial in the context of s 80 of the *Constitution*, as derived from the cases. ‘Some features that may have been regarded as essential or invariable in 1900 can now be treated as inessential. They include:’<sup>45</sup>

- 1 Juries no longer need to be constituted exclusively by men;<sup>46</sup>
- 2 Jurors no longer have to qualify for service by having minimum property holdings;<sup>47</sup>
- 3 Jurors no longer need to be segregated in every case during the trial or from the moment when they are charged to consider their verdict;<sup>48</sup>

<sup>43</sup> Ibid 306–7 [174]–[175].

<sup>44</sup> See Military Court of Australia Bill 2012 (Cth) cl 64. See *Lane v Morrison* (2009) 239 CLR 230.

<sup>45</sup> (2003) 217 CLR 521, 533 [36].

<sup>46</sup> *Cheatle v The Queen* (1993) 177 CLR 541, 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (*‘Cheatle’*).

<sup>47</sup> Ibid.

- 4 When a juror dies or is discharged, the trial need no longer be abandoned;<sup>49</sup>
- 5 A juror in waiting may be removed from the jury upon a prosecution challenge based upon the supply to the prosecution alone of information concerning a non-disqualifying criminal conviction;<sup>50</sup>
- 6 It is not every serious offence against federal law resulting in imprisonment that attracts s 80;<sup>51</sup> and
- 7 A preliminary determination of questions of law or issues governing the admissibility of evidence before the jury are empanelled is not incompatible with trial by jury.<sup>52</sup>

‘[However, other] features of jury trial have been held to be essential:<sup>53</sup>

- 1 The jury must deliver a unanimous verdict;<sup>54</sup>
- 2 Where jury numbers have been reduced before the verdict is given, the trial can still be accepted as a trial by jury, although the jury must still be of a sufficient number to be representative of the community and capable of performing the group deliberation inherent in jury trial;<sup>55</sup>
- 3 The jury must be randomly and impartially selected, not chosen by the prosecution or the state;<sup>56</sup> and

<sup>48</sup> *Brownlee v The Queen* (2001) 207 CLR 278, 290–1 [27]–[30] (Gleeson CJ and McHugh J), 301–2 [64]–[67] (Gaudron, Gummow and Hayne JJ), 331–3 [150]–[157] (Kirby J), 342–3 [187]–[191] (Callinan J) (*‘Brownlee’*).

<sup>49</sup> *Ibid* 288 [20] (Gleeson CJ and McHugh J), 303–4 [71]–[72] (Gaudron, Gummow and Hayne JJ), 331 [149] (Kirby J), 341 [183]–[184] (Callinan J).

<sup>50</sup> *Katsuno v The Queen* (1999) 199 CLR 40, 65 [52] (Gaudron, Gummow and Callinan JJ) (*‘Katsuno’*); cf at 97 [137] (Kirby J).

<sup>51</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 396–7 [24]–[25] (Gleeson CJ and Gummow J), 404–5 [50] (McHugh J); cf at 427 [105] (Kirby J). See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556.

<sup>52</sup> *R v Gee* (2003) 212 CLR 230, 276–7 [140]–[142] (Kirby J).

<sup>53</sup> *Ng v The Queen* (2003) 217 CLR 521, 533–4 [37] (Kirby J).

<sup>54</sup> *Cheatle* (1993) 177 CLR 541, 548, 550, 552, 562 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Brownlee* (2001) 207 CLR 278, 284 [5] (Gleeson CJ and McHugh J), 296–7 [52] (Gaudron, Gummow and Hayne JJ).

<sup>55</sup> *Brownlee* (2001) 207 CLR 278, 288–9 [20]–[21] (Gleeson CJ and McHugh J), 303–4 [71]–[72] (Gaudron, Gummow and Hayne JJ), 331 [149] (Kirby J), 341 [183]–[184] (Callinan J).

<sup>56</sup> *Cheatle* (1993) 177 CLR 541, 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Katsuno* (1999) 199 CLR 40, 64–5 [50]–[51] (McHugh J), 69 [67] (Kirby J).

- 4 The jury must be comprised of lay decision-makers who are impartial as to the issues in contest.<sup>57</sup>

In *Ng v The Queen*,<sup>58</sup> the High Court upheld a statutory provision permitting empanelment of more than 12 jurors, so as to provide for the replacement of any jurors who died, became incapacitated or withdrew, to ensure that the number of 12 jurors was still observed. Similarly, in *Fittock v The Queen*,<sup>59</sup> the Court concluded that the provision for reserve jurors was constitutionally valid, as has been held is the provision permitting jurors to 'separate' and return to their homes before deliberating upon, and delivering, their verdict.<sup>60</sup>

All of these decisions demonstrate how misguided are the demands that judges should merely give the 'plain language' of a public law text the meaning it bears. This is especially so in the case of the *Constitution*, whose language necessarily connotes a governmental character; is comparatively brief; was drafted and adopted in very different times; is intended to operate indefinitely; and notoriously and perhaps intentionally has proved extremely difficult to amend formally.

The foregoing problems of interpretation arise in a constitutional context. However, they could just as easily have arisen from the interpretation of an ordinary statute that made reference to jury trial, where attempts were made by subordinate legislation to elaborate that phrase and challenges were brought as to the validity of such elaboration. Drafters, however talented, cannot be omniscient. In our legal system, we normally recognise and accept this. Elaboration is permitted. It is tested in later administrative and judicial decisions. Under our system of government, the last word in a constitutional adjudication is reserved to the courts, ultimately to the High Court of Australia. If there is no relevant constitutional question, the last word is reserved to the legislators in Parliament. However, in each case, the task of the courts is, in the first instance, to give effect to the presumed purpose of the legislature as expressed in the language, which the legislature has adopted.

Moving beyond constitutional adjudication, many cases illustrate the gradual shift towards enhanced attention to the *context* of statutory provisions and to the *purpose* or *policy* that the text appears to be aiming at.

<sup>57</sup> *Cheatle* (1993) 177 CLR 541, 549–50 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>58</sup> (2003) 217 CLR 521.

<sup>59</sup> (2003) 217 CLR 508.

<sup>60</sup> See above n 48.

Because I have written elsewhere on this subject,<sup>61</sup> I will not repeat my analysis. Suffice it to say that, in the place of the literalism and so-called ‘plain meaning’ approach to interpretation used by the courts in Australia during most of the 20<sup>th</sup> century, courts today will generally address the *context* in which the critical words are stated, most especially the surrounding provisions of the language that is in question. That is, after all, the way in which communication of ideas, expressed in language, is normally revealed — from words viewed in context rather than taken in isolation.<sup>62</sup>

Obviously, the starting point for any task of interpretation is the *text*, given that it has specific legal authority. The text is written in words, symbols and images that communicate meaning to the recipient concerning what the maker of the words is seeking to convey. In a private legal document, such as a will or contract, the text gains its authority from the force that the law ascribes to the actions of the parties who adopted it. However, in the case of a statutory text, or a law made pursuant to such a text, a special legitimacy is ascribed to the parliamentary process, endorsement or authorisation. Everyone recognises that, in real terms, these considerations can sometimes be dubious or flawed. There may, for example, be little real democracy and no actual attention to the detail of the laws whilst they are passing through the legislature. Democratic legitimacy may therefore be a kind of constitutional fiction, at least to some extent. This is particularly so in the current age where fewer and fewer citizens take part in political parties, although such organisations still play a dominant role in selecting members of Parliament, deciding important matters of policy and choosing their leaders.

All this notwithstanding, the regular elections mandated by both federal and state constitutions in Australia still attach a particular legitimacy to the output of laws made by a legislature. It follows that the courts defer to the legislatures. Such deference has been a common theme of my judicial decisions.<sup>63</sup> Although there are many common elements in judicial approaches to the interpretation of private legal documents and public statutes,<sup>64</sup> the

<sup>61</sup> Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35 *Melbourne University Law Review* 113.

<sup>62</sup> *R v Brown* [1996] 1 AC 543, 561 (Lord Hoffmann), quoted in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 397 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>63</sup> See, eg, *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 394–5. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 427 [61]–[62].

<sup>64</sup> Justice Michael Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2003) 24 *Statute Law Review* 95.

public character and the accepted special legitimacy of statutes give rise to some additional rules for the latter. They mandate the ultimate supremacy of the *text*, by which a legislature, in the laws it makes, speaks to those affected, to the community and to the judges who have the responsibility and power to interpret the legally binding provisions.

The importance of a *contextual* consideration can be illustrated by reference to the many decisions that accept the fact that light can be thrown on the meaning of a critical word or words by surrounding provisions of the law in question,<sup>65</sup> by analysis of the pre-existing law, law reform and other materials,<sup>66</sup> and by examination of the legislative history and comparative provisions adopted elsewhere to address the same basic objectives.<sup>67</sup>

The Solicitor-General of the Commonwealth, Mr Stephen Gageler SC, has lately emphasised, correctly, that in the interpretation of statutes and other forms of legislation, 'context' includes not just the events and documents that predate the enactment or the making of the written law. He explains: '[T]he meaning of a statutory text is reformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases.'<sup>68</sup> This phenomenon is sometimes described as a 'dynamic' approach to interpretation. It has not so far enjoyed the attention in Australia that it has been accorded in the United States of America. For the most part, in performing the task of interpretation, courts today start with the text; then turn to any obligations required of them by provisions of interpretation statutes; and they then follow with an investigation, if that is considered necessary and useful, of the more authoritative court decisions in which the contested language has been interpreted. The foregoing approaches take the contemporary interpreter of legislation beyond the literal construction of the words in the text into access to the kinds of materials that ordinary citizens would unquestionably take into account in giving meaning to words, beyond simple dictionary synonyms.<sup>69</sup>

Even in the somewhat special field of constitutional interpretation, the 'literal' approach was never as exclusive as critics sometimes suggested. Thus, in *Australasian Temperance & General Mutual Life Assurance Society Ltd v*

<sup>65</sup> See, eg, *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 264–5 [37] (Kirby J) ('Palgo').

<sup>66</sup> See, eg, *Carr v Western Australia* (2007) 232 CLR 138, 164 [82]–[83] (Kirby J) ('Carr').

<sup>67</sup> *Ibid* 177–8 [126]–[128].

<sup>68</sup> Stephen Gageler, 'Common Law, Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash University Law Review* (forthcoming).

<sup>69</sup> See, eg, *Carr* (2007) 232 CLR 138, 176–7 [120]–[122] (Kirby J).

Howe,<sup>70</sup> Isaacs J, seemingly bristled from criticism of the then recent, and highly literalist, approach adopted by him and the High Court in the *Engineers' Case*, as to the meaning of grants of legislative power to the Federal Parliament. He said:

I quite agree that statutes should, prima facie, be construed 'literally.' But that only means, as I understand it, that the document is to be construed according to the grammatical and ordinary sense of the *actual words* employed in the Act itself ... This was the basis of the judgment of the majority in [the *Engineers' Case*].<sup>71</sup>

In construing the word 'residents' in s 75(iv) of the *Constitution*, Isaacs J, dissenting with Starke J, emphasised the purpose of the paragraph and the need to search for an interpretation appropriate to the *Constitution* as a 'great instrument of government'.<sup>72</sup> Perhaps Isaacs J maintained a special approach of 'literalism' in elaborating the ambit of the grants of federal power alongside 'purposivism' in construing other parts of the *Constitution* and ordinary legislation, because the former would specially tend to enhance the growth of the power and the unity of the Commonwealth. As a child of immigrants from a minority community, Isaacs J was philosophically inclined to favour the continuous expansion of federal power. He saw this as essential to the development, unity and safety of the Australian nation.<sup>73</sup>

More conservative Justices, on the other hand, such as Dixon J<sup>74</sup> and Barwick CJ,<sup>75</sup> embraced 'strict and complete legalism' as a principle that would best defend the High Court, in contested questions of constitutional interpretation, from the accusation that the court had meddled in politics and was simply driven by desired political outcomes. Whether those Justices invoked 'legalism' as an armour against suspicion, rather than as a practical guide to actual reasoning in every case,<sup>76</sup> is a matter upon which reasonable minds might differ.

<sup>70</sup> (1922) 31 CLR 290.

<sup>71</sup> *Ibid* 302 (emphasis in original).

<sup>72</sup> *Ibid* 306.

<sup>73</sup> Justice Michael Kirby, 'Sir Isaac Isaacs — A Sesqui-Centenary Reflection' (2005) 29 *Melbourne University Law Review* 880, 900–4.

<sup>74</sup> 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv.

<sup>75</sup> 'Retirement of Chief Justice Sir Garfield Barwick' (1981) 148 CLR v, ix–x.

<sup>76</sup> See, eg, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 178–85, 192–7 (Dixon J). See also *Queensland v Commonwealth* (1977) 139 CLR 585, 591–4 (Barwick CJ)

Nevertheless, the largest shift in the judicial approaches to interpretation of statutes during my judicial service was the greater willingness to embrace a ‘purposive’ interpretation in an endeavour (where possible) to avoid assigning a meaning to legislative words that would apparently cause the statute to miscarry, or would cause it to fail to achieve its presumed, or stated, purpose. Illustrations of a ‘purposive’ approach, and different responses to identifying the purpose in particular circumstances, may be seen in many of my decisions.<sup>77</sup>

The search for the ‘purpose’ of the text is by no means a new idea. Certainly, it cannot be claimed as an invention of the last decades of the 20<sup>th</sup> century. For centuries, common law judges accepted that a rule guiding them in ascertaining, and declaring, the meaning of legislation was that the text should be construed, so far as possible, to remedy the apparent ‘mischief’ that laid behind its enactment.<sup>78</sup> What has been new in recent decades in Australia is the greater emphasis on the purposive principle and the acceptance that such emphasis would reduce the numbers of cases where the apparent will of the legislature would be frustrated by excessively narrow and literal interpretations. Not only was the reformed approach embraced by the judiciary itself, following strong admonitions in England led by Lord Diplock, it was also given fresh emphasis by an amendment to interpretation statutes, including those in force in Australia.

The most common form of the legislative injunction to favour a purposive approach was expressed in s 15AA of the *Acts Interpretation Act 1901* (Cth) (‘AIA’). This section, as first enacted, read:

Regard to be had to purpose or object of Act

- (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that pur-

(‘*Second Territory Senators’ Case*’). See David Marr, *Barwick* (Allen & Unwin, 1<sup>st</sup> ed, 1980) 290.

<sup>77</sup> See, eg, *Palgo* (2005) 221 CLR 249, 264 [35]–[36]; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, 83–4 [96]; *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2007) 234 CLR 96, 112 [35]; *Carr* (2007) 232 CLR 138, 179 [130]–[134].

<sup>78</sup> *Heydon’s Case* (1584) 3 Co Rep 7a, 7b; 76 ER 637, 638 (Lord Coke). See also *Metal Manufacturers Ltd v Lewis* (1988) 13 NSWLR 315, 325–6 (Mahoney JA); *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387, 410 (Samuels JA), quoting *Lincoln College’s Case* (1595) 3 Co Rep 58b, 59b; 76 ER 764, 767 (Lord Coke).

pose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.<sup>79</sup>

The thrust of s 15AA in the federal statute was further reinforced by s 15AB (which likewise has counterparts in state interpretation laws).<sup>80</sup> This section is designed to permit and enhance the '[u]se of extrinsic material in the interpretation of an Act'. It does this by enhancing the access of courts to such materials and by providing a list of extrinsic materials to which, specifically, access might be had. To some extent, these two provisions (and their state and territory counterparts) simply reflected changes that were already occurring in judicial doctrine and practice in Australia, England and elsewhere. However, the provisions enjoyed the legitimacy of parliamentary endorsement for the changes that were happening anyway.<sup>81</sup>

Such provisions in statute law had a tendency to drive judges back to the statutory text (read in context and with its apparent purposes in mind). The practical problem that sometimes presents to judges is this. The *context* of contested legislation may appear to point in a particular direction. The *purpose* of the legislation may arguably point in the same direction. But if the *text* of the legislation points with sufficient clarity in a contrary direction, the judge, in Australia, will normally give primacy to that language. He or she will override the inclination to which context, purpose (and on one view the text) might otherwise point the judicial decision-maker.

A good illustration of this conclusion may be found in the decision of the High Court of Australia in *Minister for Immigration and Multicultural and Indigenous Affairs v B* ('B's Case').<sup>82</sup> That was a case in which proceedings had originally been brought in the Family Court of Australia, on behalf of two

<sup>79</sup> AIA s 15AA, as inserted by *Statute Law Revision Act 1981* (Cth) s 115, sch 1. The equivalent state and territory provisions include *Legislation Act 2001* (ACT) s 139; *Acts Interpretation Act 1954* (Qld) s 14A. The *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); and *Interpretation Act 1984* (WA) s 18 are virtually identical to the original provision of s 15AA of the AIA.

<sup>80</sup> *Legislation Act 2001* (ACT) s 142; *Interpretation Act 1987* (NSW) s 34; *Interpretation Act 1978* (NT) s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1984* (WA) s 19. There is no statutory equivalent of s 15AB in South Australia, where the use of extrinsic materials to interpret legislation is governed by the common law: *Owen v South Australia* (1996) 66 SASR 251, 255–6 (Cox J), cited by R S Geddes, 'Purpose and Context in Statutory Interpretation' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 127, 135 n 49.

<sup>81</sup> *Palgo* (2005) 221 CLR 249, 264 [35]–[36], 265 [38] (Kirby J).

<sup>82</sup> (2004) 219 CLR 365.

infant sons of refugee claimants who had arrived in Australia illegally, without entry visas. The parents claimed that they were refugees with a 'well-founded fear of persecution'<sup>83</sup> should they be returned to Afghanistan, their claimed country of nationality. Questions arose as to the parents' actual nationality, and hence that of their sons. However, these may be ignored for present purposes.

On arrival, visa-less, in Australia, the parents and their children were all immediately detained in accordance with the *Migration Act 1958* (Cth) s 189 ('*Migration Act*'). Proceedings were brought in the Family Court of Australia, concerned with the welfare of the children as children of a 'marriage' that was said to attract that Court's jurisdiction. Many issues arose in the proceedings. Relevantly, the question was whether the statutory provision requiring mandatory detention of illegal immigrants extended, by its terms, to the parents only or to the parents and the children. On behalf of the children, it was argued before the Family Court that the statutory provisions should be read down. This reading would apply the provisions for detention only to the parents and not to the children. This argument was effectively upheld by the Family Court, thereby rendering the detention of the children unlawful.<sup>84</sup> Pursuant to orders of the Family Court, the children were released from detention into the custody of suitable guardians who provided for their education and welfare in the Australian community whilst the parents' applications awaited determination. The Minister then obtained special leave to appeal against this decision to the High Court of Australia.

The provisions of the *Migration Act*, authorising 'detention of unlawful non-citizens', made no explicit differentiation between the treatment of child and adult non-citizens.<sup>85</sup> However, it was argued (as a majority in the Family Court accepted) that the Act should be interpreted so as to apply only to adult non-citizens and not to apply to child non-citizens. An important reason, advanced in support of this conclusion, was the fact that Australia had ratified the United Nations *Convention on the Rights of the Child* ('CRC'),<sup>86</sup> without any relevant reservation. As the relevant article stated,

<sup>83</sup> *Migration Act 1958* (Cth) ss 36, 91R. See *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2).

<sup>84</sup> *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604, 666–7 [387]–[389] (Nicholson CJ and O'Ryan J) (Full Court).

<sup>85</sup> *Migration Act* div 7.

<sup>86</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

States parties shall ensure that:

- (a) No child shall be subjected to ... cruel, inhuman or degrading treatment or punishment. ...
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The ... detention ... of a child shall be in conformity with the law and shall be used *only as a measure of last resort and for the shortest appropriate period of time.*<sup>87</sup>

An argument that succeeded before a majority in the Full Court of the Family Court was that the relevant provisions of the *Migration Act*<sup>88</sup> should be read so as not to bring Australia into breach of the foregoing provision of art 37(b) of the *CRC*.<sup>89</sup> It was to be presumed, from ratification of the *CRC*, that the Australian government and Parliament did not intend to breach the provisions of international law.<sup>90</sup> The *CRC* is one of the most widely ratified statements of international law in existence. Although it is not expressly enacted as part of Australia's domestic law, there was said to be a legitimate expectation that the Federal Parliament would not enact provisions for child detention in flagrant breach of the obligations undertaken by ratification and now, possible obligations arising as an aspect of international customary law: the universal law binding upon all civilised nations.<sup>91</sup>

Anyone familiar with my judicial<sup>92</sup> and extra-judicial<sup>93</sup> writings will appreciate that it would not have taken much to persuade me to read down the statutory provisions applicable in such a case. After all, the worst that could then happen would be that the Federal Parliament and government would be required to face squarely the apparent clash between the provisions of an Australian enacted law and the clear terms of the *CRC* to which

<sup>87</sup> *Ibid* art 37 (emphasis added).

<sup>88</sup> *Migration Act* ss 5(1) (definition of 'non-citizen'), 189.

<sup>89</sup> *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604, 666 [388] (Nicholson CJ and O'Ryan J); *B's Case* (2004) 219 CLR 365, 420 [153] (Kirby J).

<sup>90</sup> *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604, 651 [287] (Nicholson CJ and O'Ryan J); *B's Case* (2004) 219 CLR 365, 417 [145] (Kirby J).

<sup>91</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J). See Heather Roberts and John Williams, 'Constitutional Law' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 179, 192.

<sup>92</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 615–16 [148].

<sup>93</sup> See Roderic Pitty, 'In Harmony with Human Rights' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 487, 502–13.

Australia had subscribed and the consequent international law. At the conclusion of oral argument in hearing of the case, I was therefore inclined to dismiss the appeal from the orders of the Full Court of the Family Court and to affirm that Court's decision.

However, upon re-reading the transcript of argument, reconsidering the submissions of the parties and reflecting further on the detail of those submissions, I found myself constrained to reach the opposite conclusion. I joined in the unanimous orders of the High Court, setting aside the disposition of the Family Court and ordering the dismissal of the proceedings in that Court.<sup>94</sup>

The actual process of reaching judicial reasoning, and proceeding to conclusions formulated in judicial orders, is relatively little analysed. In this regard, law schools are quite different from business schools. In the latter, by reference to corporate board minutes, documentary evidence, directors' and officers' testimony, the paper and email trail, and anecdotal materials, students of business governance and strategy spend endless hours examining how both good and bad business decisions are reached and where precisely any mistakes took place at the decision-making level. In *B's Case*, I identified in my reasons the two considerations that ultimately persuaded me to reject the arguments advanced on behalf of the children.<sup>95</sup>

The first was a *contextual* consideration rather than a *textual* one. The hypothesis that found favour in the Family Court of Australia was essentially that the Federal Parliament must have overlooked the requirements of the *Convention* so that, armed with those requirements, the decision-maker should impute to the Parliament an intention not to ignore Australia's international obligations as expressed in the *Convention*. However, a closer reading of the materials drawn to notice in the High Court showed that, in support of the Commonwealth's submissions, not only had this conflict of legal possibilities been expressly drawn to the notice of the government by the officials of the Attorney-General's Department,<sup>96</sup> the *CRC* provision had been specifically noted by the relevant parliamentary committee on migration and effectively dismissed on the ground that '[i]t is important to ensure that immigration to Australia cannot be achieved simply by arrival.'<sup>97</sup> If there were

<sup>94</sup> *B's Case* (2004) 219 CLR 365, 427 [179]–[180].

<sup>95</sup> (2004) 219 CLR 365, 420–1 [156].

<sup>96</sup> Joint Standing Committee on Migration, Parliament of Australia, *Asylum, Border Control and Detention* (1994), cited in *ibid* 422–3 [162]–[164].

<sup>97</sup> Joint Standing Committee on Migration, Parliament of Australia, *Asylum, Border Control and Detention* (1994), quoted in *B's Case* (2004) 219 CLR 365, 424–5 [169].

an inconsistency between the *Convention* and the Australian statutory provisions relating to children, the extrinsic documents demonstrated that this was not an oversight by the Parliament. It was deliberate. Thus, on the face of the documents, '[m]andatory detention of unlawful non-citizens who are children is the will of the Parliament of Australia', acting within its constitutional powers.<sup>98</sup>

In addition to this powerful consideration of *context*, another consideration demanded the same conclusion and was fatal to the proposition advanced for the children. This was that the *textual* provision for detention was not general (as by reference to the detention of 'persons') but specific as by reference to 'non-citizens', which the children undoubtedly were. Moreover, provisions were included in the *Migration Act* that were specific to the status of children.<sup>99</sup> These concerned the recovery of costs of detained spouses and dependants.<sup>100</sup> There were also provisions for bridging visas.<sup>101</sup> Additionally, there were provisions in the Act for the searching of children in detention that were incompatible with the hypothesis that children, as a class, were excluded, as a matter of *text*, from the operation of the provisions for mandatory detention. These textual provisions led me to the following conclusion:

The language of the [*Migration Act*] is intractable. It cannot be 'read down' to avoid any problems created by obligations derived from international law. The effect of ss 189 and 196 is that no decision under the [*Migration Act*] is required as a precondition to the existence of the power and duty of 'officers' to detain an unlawful non-citizen, adult or child. Detention depends solely upon the status of that person as an unlawful non-citizen. The duration of detention is governed by the provisions of the Act. An alien child, as much as an alien adult, falls within the designated status. The provisions of the [*Migration Act*] are susceptible to no other construction.<sup>102</sup>

Some distinguished judges, looking back on a lifetime of efforts at textual interpretation, have concluded that statutory interpretation is "[a] non-subject" ... meaning that it is really about life and human nature itself — too

<sup>98</sup> *B's Case* (2004) 219 CLR 365, 425 [171]; *Constitution* ss 51(xix), (xxvii).

<sup>99</sup> *B's Case* (2004) 219 CLR 365, 421–2 [158].

<sup>100</sup> *Migration Act 1958* (Cth) ss 211–12.

<sup>101</sup> *Ibid* ss 31(3), 37, 72, 73.

<sup>102</sup> *B's Case* (2004) 219 CLR 254, 422 [159] (citations omitted).

broad and deep and variegated to be encapsulated in any theory, or, really, to be taught.<sup>103</sup>

As Jeffrey Barnes has pointed out,<sup>104</sup> Lord Wilberforce was not alone in expressing the foregoing view, being joined, in a like opinion, by distinguished academics<sup>105</sup> and by other former judges.<sup>106</sup> Whilst I acknowledge the variable factors that impinge upon the decision-making of different judges, and even the same judges over time, it is desirable that more analysis should be attempted than simply to assert that the preferred interpretation is ‘intuitive’ or ‘inescapably personal’.

If the rule of law, as it applies in judicial decisions, involves nothing more than a cloak for judicial office-holders, giving them the authority to do what they prefer, it is necessary to posit that judges must sometimes feel bound to reach conclusions that are painful to their inclinations, values and instincts. It is the constraint of law that makes the difference between a society governed by law and one simply governed by the will of high officials, however well-educated, experienced and specially garbed, called judges. Without exaggerating the number of cases where the rules demand only one conclusion, contrary to experienced intuition, such cases certainly exist. It is as well that everyone, including the judges, should be aware of them. They bear out, I believe, the proposition that the shift in statutory interpretation, and for that matter constitutional interpretation, that has occurred in recent decades can be summarised with a Biblical analogy, for judges, practising lawyers and legislative drafters endeavouring to see through a glass darkly into the meaning of words: And now abideth text, context, purpose, these three; but the greatest of these is text.<sup>107</sup>

#### IV A 2011 AMENDMENT

One final issue should be addressed because of its timeliness and relevance to these themes. In 2012, amendments to the *AIA*, which were enacted by the Federal Parliament in the *Acts Interpretation Amendment Act 2011* (Cth),

<sup>103</sup> Lord Wilberforce, ‘A Judicial Viewpoint’ in Attorney-General’s Department, *Symposium on Statutory Interpretation* (Australian Government Publishing Service, 1983) 5, 6.

<sup>104</sup> Barnes, above n 20, 728–31.

<sup>105</sup> See, eg, John Burrows, ‘The Changing Approach to the Interpretation of Statutes’ (2002) 33(3) *Victoria University Wellington Law Review* 561.

<sup>106</sup> See, eg, Justice Frank Callaway, ‘Judges and Statutes’ (Winter 2005) *Bar News: The Journal of the NSW Bar Association* 25. See also Barnes, above n 20, 729.

<sup>107</sup> See *1 Corinthians* (Oxford University Press, King James Version, 2008 ed) 13:13.

took force.<sup>108</sup> For the most part, the amendments involved tidying up the statute and clarifying some of its terms. However, one potentially important provision, relevant to my present theses, was included in an amendment to s 15AA of the Act, designed to recast the language of that provision. The section as amended now reads:

15AA Interpretation best achieving Act's purpose or object

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

There was no material information in the Attorney-General's second reading speech about the particular objective of this substitution.<sup>109</sup> However, the explanatory memorandum, issued with the Bill, provided a little background. It said:

Section 15AA, which deals with interpretation of Acts, is currently expressed in absolute terms, ie a construction that will promote the purpose of an Act is to be preferred to one that will not. Section 15AA does not address the situation where there is a choice between two or more constructions that will promote Parliament's purpose.

The limited nature of section 15AA was confirmed by three High Court judges in a case on the equivalent Victorian provision (see *Chugg v Pacific Dunlop Pty Ltd*).

Therefore section 15AA is being amended to provide that a court is to prefer the construction of an Act that will 'best achieve' the purpose or object of the Act.<sup>110</sup>

Concern has been expressed that the new language of s 15AA introduces a significantly different approach to the task of interpretation.<sup>111</sup> Whereas in the

<sup>108</sup> The Acts Interpretation Amendment Bill 2011 (Cth) passed the House of Representatives on 25 May 2011 and the Senate on 15 June 2011 (royal assent 27 June 2011). AIA s 15AA, as amended by the *Acts Interpretation Amendment Act 2011* (Cth) sch 5 s 23, came into force on 28 December 2011.

<sup>109</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2011, 3797 (Robert McClelland, Attorney-General).

<sup>110</sup> Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 19 [99]–[101], citing *Chugg v Pacific Dunlop Pty Ltd* (1990) 170 CLR 249, 262 (Dawson, Toohey and Gaudron JJ).

past, that task has involved giving weight to a ‘balance of considerations’,<sup>112</sup> an anxiety is voiced that the new provision will simply swamp all of the old traditional values and considerations with a blanket obligation that assigns predominance to the ascertainment of the purpose of the Parliament. In short, the purposive approach will overwhelm all considerations of text, context, traditional linguistic canons of construction, legislative history, and the established presumptions (such as the one confining the ambit of the operation of penal provisions or provisions that derogate from traditional civil rights).

Whilst I concede that, textually, such an interpretation is available, based on the amended language of s 15AA, and especially because of the phrase ‘each other interpretation’, several considerations militate against accepting the ‘swamping’ theory:

- 1 There is no suggestion of such a radical objective either in the second reading speech or in the Explanatory Memorandum, as one might have expected if such a major change to the Australian rules of statutory interpretation had been intended;
- 2 To the contrary, the explanation given in the Memorandum suggests that the specific purpose of the replacement of the former provisions of s 15AA was limited to the fact that the original provisions evidenced an assumption that there were only ever two objectives in competition whereas sometimes (perhaps often) there might be more, and this is now explicitly recognised, and expressly provided for, in the new text of the section;
- 3 The context of the section, appearing as it does in an enactment that continues many other rules that govern and guide statutory interpretation, suggests that the purpose of the new provision is more limited than originally feared. Otherwise, the AIA, as it now stands, could be radically abbreviated both in contents, scope and size on the hypothesis that, effectively, the only (or overwhelming) rule is now the purposive rule of interpretation. The implication from the surviving detail in the AIA is that s 15AA, even in its new form, is simply one of many statutory provisions designed to assist interpreters in their often complex task. And alongside

<sup>111</sup> Jeffrey Barnes, ‘The Well-Furnished Interpreter: A Contemporary Guide’ (Unpublished paper presented at the Conference on Statutory Interpretation, Crown Solicitor’s Office, Adelaide, 2 June 2011).

<sup>112</sup> *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J), quoted in *Singh v Commonwealth* (2004) 222 CLR 322, 325–6 [19] (Gleeson CJ).

these statutory provisions are many common law requirements that coincide with the statutory provisions;

- 4 If there were any doubt, the foregoing seems likely to be the approach that the courts would take to s 15AA as now re-expressed, when to the re-expression is applied the basic principle, long enunciated by the courts, that enactments that derogate from established civil rights must be clear. Otherwise, such provisions will be construed, so far as possible, so as to be consistent with the survival of those rights.<sup>113</sup> Thus, the rights in question are themselves protected by the many other rules and principles ('balance of considerations') that have hitherto been weighed in competition with each other in reaching a final conclusion on the meaning of the legislation in question. No good reason appears as to why the contrary 'swamping' theory should be endorsed to replace this well-established judicial approach;
- 5 This being the case, the correct, and preferable, interpretation of the amended provisions of s 15AA is that it is, and remains, a provision addressed to the expression, in legislative form, of the 'purposive rule', and that rule alone. So read, it clearly has work to do. But that work still leaves many other rules, canons and principles to fulfil their respective purposes in competition with the 'purposive' rule. It does not obliterate the weighing process that takes into account all of the relevant interpretative criteria;<sup>114</sup> and
- 6 If a legislature in Australia, certainly the Federal Parliament, were to be so bold as to attempt to enact a 'swamping' rule that would intrude into the judicial task of interpretation and effectively obliterate all of the many considerations that have been devised by the judges over centuries to explain the subtle and partly intuitive functions they perform in giving meaning to statutory and constitutional texts, the attempt might constitute an invalid intrusion by the legislature into the judicial function of inter-

<sup>113</sup> See, eg, *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4<sup>th</sup> ed, 1905) 122; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ). See also Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 774–5, 780–1.

<sup>114</sup> F A R Bennion, *Understanding Common Law Legislation* (Oxford University Press, 2001) 114; Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi trans, Princeton University Press, 2005) 47.

pretation. Such intrusions are occasionally attempted. In the United States Congress in 2005, for example, a Bill was introduced, purporting to provide that:

In interpreting and applying the *Constitution of the United States*, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law [up to the time of the adoption of the *Constitution of the United States* in 1776].<sup>115</sup>

The validity and utility of such a rule has been doubted by many commentators,<sup>116</sup> including by one member of the Supreme Court of the United States writing extra-curially.<sup>117</sup> If an alternative construction of s 15AA were available, as I believe it is, which would avoid any constitutional problem of invalidity, it seems likely that it is the one that would be adopted by the courts of Australia.

The foregoing controversy about the amended provisions of s 15AA of the AIA is simply the latest in the centuries-old debates about the interpretation of legal language and specifically of enacted statutory provisions.

Were he still with us, John Finemore would have been engaged with these debates, especially so with any suggestion that the Federal Parliament was pushing its constitutional powers beyond their proper ambit. For those who teach the interpretation of the written law, and those who practise it in legal and other offices and in the courts, the debates are never-ending.

## V FASHION AND CHANGE IN STATUTORY INTERPRETATION

It is possible to argue that the gradual, and in my view beneficial, evolution of the Australian approach to statutory interpretation, utilising text, context and purpose (policy), has been interrupted by a reversion to literalism and 'plain meaning' on the part of some Justices of the High Court.

<sup>115</sup> Constitution Restoration Act of 2005, S 520, 109<sup>th</sup> Congress § 201 (2005). See also Constitution Restoration Act of 2004, HR 3799, 109<sup>th</sup> Congress § 201 (2004).

<sup>116</sup> See, eg, Judge John Kane, 'International Law from the Trial Judge's Vantage Point' (2007) 35 *Denver Journal of International Law and Policy* 379, 386.

<sup>117</sup> Michael Kirby, 'Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?' (2010) 98 *Georgetown Law Journal* 433, 442, citing Justice Antonin Scalia, 'Romancing the *Constitution*: Interpretation as Invention', in Grant Huscroft and Ian Brodie (eds), *Constitutionalism in the Charter Era* (LexisNexis, 2004) 337, 341.

In the great matter of legislative interpretation, there is of course never a last word. Trends and cycles appear and disappear, only to re-emerge when judges of a later age revert to the earlier way of doing things, familiar in the golden days of their youth.

Some evidence of such a reversion might be seen in a number of recent decisions. A clear source of concern, in this regard, may be found in the comment of five Justices of the High Court in *Saeed v Minister for Immigration and Citizenship* that ‘it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.’<sup>118</sup>

There are other warning flags that seem, in my respectful view, to indicate that a change of emphasis and mood, if not direction, might be afoot.<sup>119</sup> Certainly, experienced judges have picked up the signals. Some it is true, are unconcerned.<sup>120</sup> Others are anxious about what they see, because an advantage of the previous evolution was that it accepted, and accommodated, the complexity of the ordinary processes of human understanding in extracting meaning from spoken and written language.<sup>121</sup> If complexities and ambiguities may not even be recognised or appreciated, because the interpreter is excluded from access to considerations of context and purpose, may the process of a broader and more natural and realistic approach to the task of interpretation be stillborn?

These are puzzles for another time and a different essay, by which stage, the survival of the tripartite approach to the task of statutory interpretation will be better known than it is at present. Or at least a new and different stage will have been reached in the never-ending tussle between the approach of the legal literalists and that of the legal contextualists and purposivists.

Those who draft legislation must be aware of the course of such debates. Such debates, and the court holdings that respond to them, influence and affect the effort to express the will of the lawmakers in terms that are as clear,

<sup>118</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>119</sup> *Palgo* (2005) 221 CLR 249, 265 [40] (Kirby J); *R v Lavender* (2005) 222 CLR 67, 89 [69] (Kirby J); *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2002) 234 CLR 96, 113 [36] (Kirby J); *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285, 289 [7] (Kirby J).

<sup>120</sup> See, eg, Chief Justice J J Spigelman, ‘The Intolerable Wrestle: Developments in Statutory Interpretation’ (2010) 84 *Australian Law Journal* 822, 826–31.

<sup>121</sup> See Justice P W Young, ‘Current Topics’ (2012) 86 *Australian Law Journal* 7, 7–8. See also the remarks of Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 where he said: ‘The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.’

succinct and effective as human skill and ingenuity can achieve. In such endeavours, John Finmore, long-time Chief Parliamentary Counsel of Victoria, was a marvellous Australian example and an inspiration to all of us, the lawyers who follow.